Supreme Court of the United States

OCTOBER TERM, 1938.

No. 133.

THE BALTIMORE AND OHIO RAILROAD COMPANY, *et al.*,

Appellants,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, *et al.*,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR CITY OF BOSTON AND BOSTON PORT AUTHORITY, APPELLEES.

HENRY PARKMAN, Jr.
Corporation Counsel, City of Boston,
11 Beacon Street,
Boston, Massachusetts.

HENRY E. FOLEY
Counsel for Boston Port Authority,
10 Post Office Square,
Boston, Massachusetts.

LEWIS H. WEINSTEIN
Assistant Corporation Counsel, City of Boston,
11 Beacon Street,
Boston, Massachusetts,
Of Counsel.

CITY OF BOSTON PRINTING DEPARTMENT

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I.

Opinions.

The opinion of the specially constituted District Court is reported in 20 Federal Supplement 273 and a concurring opinion of Judge Hulbert in 20 Federal Supplement 917. These opinions are set forth in the Record beginning at page 302. The Court made and filed findings of fact and conclusions of law, which appear in the Record, beginning at page 341.

The general report of the Interstate Commerce Commission, announcing certain governing principles is reported in *Ex Parte No. 104, Practices of Carriers Affecting Operating*

Revenues or Expenses, Part VI, Warehousing and Storage of Property by Carriers at Port of New York, N. Y., 198 I. C. C. 134. This report is set forth in the Record at pages 29 to 115. Supplemental reports in said proceedings are reported in 216 I. C. C. 291 and 220 I. C. C. 102. These reports are set forth in the Record at pages 120 to 199 and 269 to 271, respectively. The order involved in the above-entitled cause was entered in connection with the last-referred to report. (R. 272–274.) All said reports are referred to in said order and made part thereof.

II.

Jurisdiction.

The Final Decree of the District Court was entered March 23, 1938. (R. 406.) Petition for Appeal was entered and allowed May 3, 1938. (R. 406–412.) Paragraph I of Rule 12 has been complied with and an order was entered on October 10, 1938, noting that probable jurisdiction had been shown.

III.

Statement of the Case.

This proceeding is a direct appeal from a final decree of a specially constituted District Court which dismissed Appellants' bill to enjoin and set aside an order of the Interstate Commerce Commission.

As the Statement of the Case set forth by Appellants in their brief (Appellants' Brief, pages 2 to 7) does not in the judgment of these Appellees adequately state the facts, the following statement is submitted:

1. Proceedings before the Commission:

On July 6, 1931, the Commission instituted an investigation on its own motion in a proceeding entitled—*Ex Parte No. 104, Practices of Carriers Affecting Operating Revenues*

or Expenses — for the purpose of determining whether certain carriers, including the Appellants herein, parties to said proceeding, were being operated economically and efficiently within the provisions of sections 12 and 15a of the Interstate Commerce Act. (R. 25.) While said proceedings were pending, warehouse operators located in New York filed complaints with the Commission especially directing attention to the warehousing practices of carriers serving that district, including the Appellants, and requesting an investigation into such practices. (R. 31.)

On January 6, 1932, the Commission instituted such investigation on its own motion, designating the proceeding as *Part VI* (of said Ex Parte No. 104), *Warehousing and Storage of Property by Carriers at Port of New York, N. Y.* Appellants were named as parties respondent. (R. 26–28.)

After extended hearings and the presentation of voluminous evidence, oral and documentary, and after argument, the Commission on December 12, 1933, issued its first report in said proceeding. (R. 29–115.) In this report extended findings were made to the effect that each of the Appellants herein, directly or through controlled subsidiaries, engages extensively in the commercial warehousing and storage business in the Port of New York District; that in the course of that business each renders warehousing and storage services and services incidental thereto to certain shippers at less than the cost to Appellants of rendering the same; that the purpose of these below cost services is the inducement of shippers to use Appellants' respective lines and that not all shippers receive these services and facilities, but some, including competing warehousemen, are substantially injured thereby. The Commission further found that while certain storage afforded by Appellants was provided for in tariffs and described therein as in-transit storage, this storage was not in fact an in-transit service, but was a commercial service under the guise of a transportation service. (For record references to these findings see V, Point I, B, *infra*, pages 11 to 25.) No order was issued at

the time but Appellants were admonished that their practices and charges should be adjusted in conformity with the principles announced in the report. (R. 113.)

Conformity with the principles so announced was not secured (R. 122), and by order dated May 6, 1935, the proceeding was reopened. (R.117–119.) Further hearings were duly held and voluminous evidence again introduced. On June 8, 1936, the Commission issued its second report. (R. 120–199.) This report contained further detailed findings with regard to the warehousing and storage practices of each of the Appellants. The Commission again found that each of the Appellants, either directly or through controlled companies, was engaged in the commercial warehouse and storage business in competition with and to the injury of other commercial warehouses in the Port of New York District; that certain shippers received these commercial services and others did not; that this business was conducted at a loss and that it was conducted with the purpose of attracting traffic to its line. The Commission again found that so-called in-transit storage was not a transportation service but was a commercial service, and part of the warehousing and storage business in which the Appellants were engaged. (For record references to these findings see V, Point I, B, *infra*, pages 11 to 25.)

The Commission concluded that the commercial warehousing and storage practices described, constituted violations of sections 2, 3 and 6 of the Interstate Commerce Act.* (49 U. S. C., §§ 2, 3, 6.) A cease and desist order was entered (R. 199–201), but did not become effective. (R. 266–268.)

After the issuance of this report and rehearing upon the Appellants' petition, the Commission issued a third report. (R. 269–271.) In this report the Commission said:

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* The relevant portions of these sections and of sections 15 (13) and 16 (8) of the Interstate Commerce Act (49 U. S. C., §§ 15 (13) and 16 (8)) also deemed relevant are printed in the Appendix, pages 47 to 49.

"We find the facts as stated in our previous reports to be correct, and those findings and conclusions of law with respect to the above matters are reaffirmed." (R. 270.)

While it reversed its prior determination that Appellants should cancel their so-called storage in-transit tariffs, it renewed its finding that the storage services rendered thereunder were commercial services. (R. 271.)

With this report the Commission entered its order of February 2, 1937. (R. 272–274.) This is the order involved in the present appeal.

The order directs each of the Appellants to cease and desist and abstain from:

"* * * permitting shippers in interstate commerce over said respondents'* lines to occupy space by lease or otherwise in warehouses, buildings, or on piers owned or controlled directly or indirectly by, or affiliated with said respondents in the Port of New York district, at rates and charges which fail to compensate said respondents for the cost of providing said space.

"* * * storing goods shipped over said respondents' lines in interstate commerce; or providing storage space to shippers in interstate commerce over said lines for commercial storage of goods, as fully defined in said reports at rates and charges which fail to compensate said respondents for the cost of storing such goods or providing such storage space.

"* * * directly or indirectly handling goods incident to commercial storage as fully defined and described in said reports, at said warehouses, buildings or piers for shippers in interstate commerce at rates and charges which fail to compensate said respondents for the cost of said handling.

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*The term — respondents — is used throughout the three reports of the Commission to designate the seven carriers who are Appellants herein, namely, The Baltimore and Ohio Railroad Company, The Central Railroad Company of New Jersey, The Delaware, Lackawanna & Western Railroad Company, Erie Railroad Company, Lehigh Valley Railroad Company, The New York Central Railroad Company and The Pennsylvania Railroad Company.

"* * * insuring goods shipped over said respondents' lines in interstate commerce and stored in connection with commercial warehousing, as fully defined and described in said reports, at said warehouses, buildings or piers in the Port of New York district for shippers in interstate commerce at less than the cost of providing such insurance.

"* * * applying, by means of tariffs now on file with this Commission * * *, non-compensatory rates and charges, as fully described in said reports, for the leasing of space, storage, handling and insurance of goods shipped over their lines in interstate commerce which goods are stored, handled or insured in connection with commercial warehousing service as fully defined and described in said reports."

The effective date of said order was by subsequent orders postponed until November 13, 1937.

In view of the importance of the fact findings of the Commission, basic findings which support its order are elaborated in Point I of the Argument, hereinafter made (*infra*, pages 9 to 25).

IV.

Summary of Argument.

1. The Interstate Commerce Commission has made the following basic findings:

(a) Each of the Appellants is engaged in the commercial warehouse and storage business in the Port of New York District and, in the course of that business, renders to certain shippers warehouse and storage services and services incidental thereto;

(b) The commercial warehouse and storage services rendered by Appellants are rendered at rates and charges below the cost to Appellants of furnishing the same.

(c) These commercial services are made available by Appellants for the purpose of inducing traffic movement over their respective lines.

(d) Not all shippers over Appellants' lines receive these commercial services. Some shippers, including competitors of Appellants in the warehouse and storage business, are substantially injured thereby.

2. The Commission having made the findings hereinabove set forth, and these findings being supported by evidence, they establish the facts found. (*Florida* v. *United States*, 282 U. S. 194, 215 (1930).)

3. The rendering by Appellants, in the course of the commercial warehouse and storage business undertaken by them, of warehouse and storage services to certain shippers at less than cost, constitutes an unjust discrimination against and undue prejudice to competitors of Appellants in the commercial warehouse and storage business, who are shippers over Appellants' lines, in violation of sections 2 and 3 of the Interstate Commerce Act (49 U. S. C. §§ 2, 3). Such practices also constitute a departure from Appellants' transportation rates in violation of section 6 (49 U. S. C. § 6). Appellants' losses in their commercial business are met out of their transportation revenue. This in effect diminishes their transportation rates. Their competitors in the warehouse business must when shipping pay the full transportation rates, undiminished by commercial losses. (*New York, New Haven and Hartford Railroad Company* v. *Interstate Commerce Commission*, 200 U. S. 361 (1906).)

4. The rendering by Appellants of commercial services to certain shippers below cost for the purpose of inducing the movement of traffic over Appellants' respective lines, is a traffic-buying technique which results in unjust discrimination and undue preference in violation of sections 2 and 3 of the Act. It is immaterial whether or not certain of the shippers receiving such services pay full value therefor. Traffic may not be so bought. (*Lehigh Valley Railroad Company* v. *United States*, 243 U. S. 444 (1917).) The Commission found the source of the discrimination and prejudice to be the below-cost charges for commercial services. The Commission, therefore, properly enjoined the rendering of

such services at below-cost charges. (*Merchants Warehouse Company* v. *United States*, 283 U. S. 508 (1931).)

5. The rendering by Appellants of commercial warehouse and storage services below cost to certain shippers for the purpose of inducing traffic movement results in a departure by Appellants from their published transportation rates in violation of section 6 of the Act. Commercial losses are met out of those rates, thereby in effect cutting the rates. Unjust discrimination against and undue prejudice to *all* shippers over Appellants' lines who receive similar transportation services but do not receive the below-cost services result in violation of sections 2 and 3. Such shippers must pay the transportation rate undiminished. (See *New York, New Haven and Hartford Railroad Company* v. *United States*, 200 U. S. 361 (1906).)

6. Publication in tariffs of certain of these below-cost commercial services and of the charges therefor does not make the services transportation services or prevent their below-cost nature from effecting a departure from Appellants' transportation rates in violation of section 6. As the charges are below-cost, the loss must be met out of Appellants' transportation rates. This effects the violation of section 6. (*United States* v. *American Tin Plate Company*, 301 U. S. 407 (1937). *United States* v. *Pan American Petroleum Corporation et al.*, 304 U. S. 156 (1938).) The tariffs are not in fact open to all. Publication, therefore, does not prevent a violation of sections 2 or 3.

7. The Commission's order is a valid exercise of the Commission's power to prevent unjust discrimination and undue prejudice in violation of sections 2 and 3 of the Act and to prevent departures from Appellants' transportation rates in violation of section 6. It is therefore not in conflict with the Fifth Amendment to the Federal Constitution (*Los Angeles Switching Case*, 234 U. S. 294 (1914) and *O'Keefe* v. *United States*, 240 U. S. 294 (1916)). The cost standard laid down is sufficiently certain (*Nash* v. *United States*, 229 U. S. 373 (1913); *Hygrade Provision Company* v. *Sherman*,

266 U. S. 497 (1925)); and only knowing violation of the order will result in the infliction of penalties (49 U. S. C., § 16 (8); *American Telephone and Telegraph Company* v. *United States*, 299 U. S. 232 (1936)).

V.

Argument.

POINT I.

Each of the Appellants is engaged in the commercial warehouse and storage business in the Port of New York District. In the course of that business each Appellant is rendering to certain shippers warehouse and storage facilities and services incidental thereto at rates and charges which are less than the cost of furnishing the same. These facilities and services are made available for the purpose of inducing the movement of traffic over the respective lines of the Appellants. Not all shippers over those lines receive these services. Some, including competitors of Appellants in the warehouse business, are substantially injured thereby.

A. The finality of the Commission's findings of fact.

As will hereafter be demonstrated the Commission has found each of the facts hereinabove recited under the heading—Point I.

This section of the Brief does not deal immediately with the validity of the order made by the Commission. It is concerned with an essential but subsidiary point — that is, with basic findings of fact of the Commission and the finality of those findings.

Findings of fact of the Commission, made after hearing and based upon evidence presented to it, are final.

As stated in *United States* v. *Louisville & Nashville Railroad Company*, 235 U. S. 314, 321 (1914):

> "It cannot be otherwise since, if the view of the statute upheld by the Court below be sustained, the Commission would become a mere instrument for the purpose of taking testimony to be submitted to the courts for their ultimate action."

And as stated in *Florida* v. *United States*, 282 U. S. 194, 215 (1931):

> "The Commission is the fact finding body and the Court examines the evidence not to make findings for the Commission but to ascertain whether its findings are properly supported."

It is true, as contended by Appellants (Appellants' Brief, p. 12), that an order of the Commission must be supported by findings of the basic or quasi-jurisdictional facts conditioning its power, but it is submitted that adequate findings supporting the Commission's order have been made by the Commission and that the Commission having made those findings, the facts as found are conclusively established.

This Court may, of course, if the Commission's findings of fact are challenged as unsupported by evidence, inquire as to their evidentiary basis. But Appellants in their appeal have not challenged the evidentiary basis of the facts found by the Commission. In their brief, they say at page 7:

> "Appellants' position on this appeal is that the findings made by the Commission, taken at their full face value, are insufficient in law to sustain the order. Appellants' assignments of error are all to this effect. (R. 407.) They have not deemed it necessary to assign any errors with respect to the sufficiency of the evidence to support the Commission's findings and, therefore, the evidence is not included in the printed record on appeal. (R. 413–415.)"

It is, therefore, submitted that the findings of fact made by the Commission are final and establish the facts found.* Under Points II and III *infra*, we shall urge that the facts so found justify the order.

B. Basic facts found by the Commission.

1. Each of the Appellants is engaged in the commercial warehouse and storage business and in the course of that business renders to certain shippers warehouse and storage services and services incidental thereto.†

The Commission has found and it is undisputed by Appellants that Appellants render to certain shippers warehouse and storage services.

It is also undisputed that carriers may under some circumstances perform storage for shippers in the course of, and as necessarily incident to, transportation which is so related to the transportation duties of the carrier as to be incidental to transportation and as not to constitute engaging in the commercial storage and warehouse business.

Apart, however, from the question of whether Appellants do engage in the commercial storage and warehouse business or may properly do so, there can be no doubt that Appellants can (whether properly or not) in fact engage in such business.

Since Appellants can engage in the commercial warehouse and storage business as well as in the transportation business, when Appellants render warehouse and storage services, the question of whether Appellants are engaged

*In this connection it should be noted that the District Court made the following finding:

"3. The Commission's findings, as made in its reports of December 12, 1933, June 8, 1936, and February 2, 1937, are supported by adequate evidence and are sufficient support in law for the order of February 2, 1937." (R. 403.)

†The incidental services referred to are handling and insurance of freight stored under the so-called west-bound storage in-transit tariffs. Since the same principles govern these services as govern said storage, detailed discussion with reference thereto is omitted from this brief. The facts found with reference to these incidental services parallel the facts found with reference to the so-called in-transit storage. (R. 185–188; 192–196; 196–198.) The applicable law is the same.

in the commercial warehouse and storage business as well as in the transportation business is a question of fact.

The problem is analogous to that of whether certain carrier activities constitute a part of the performance of its transportation duties or are outside thereof and in addition thereto. Such matters have consistently been held to be matters of fact for the Commission:

> *United States* v. *American Tin Plate Company*, 301 U. S. 402, 407, 408 (1937).
> *Los Angeles Switching Case*, 234 U. S. 294, 311 (1914).
> *Merchants Warehouse Company* v. *United States*, 283 U. S. 501, 508 (1931).

The question of fact, namely, are Appellants engaged in the commercial warehouse and storage business, has been resolved by the Commission. The Commission has found that Appellants are so engaged, and that, in the course of such business, they are rendering warehouse and storage services to certain shippers.

That the Commission has so found appears from the following quotations from its reports:

> "It follows that we have authority to require the carriers to cease *engaging in the commercial warehouse business*, in cases where it is shown that the business is of such a nature that its conduct by the carrier necessarily results in violations of the law administered by the Commission." (R. 104.)

> "The motive of the carriers *in engaging in the commercial business* is to induce shippers to use their rail facilities and thereby increase the volume of traffic over their respective lines." (R. 105.)

> "The above question, as stated by the Court, can properly be paraphrased to cover the situation here presented, as follows: Has a carrier engaged in transporting commodities in interstate commerce the power to furnish directly or indirectly storage or warehousing facilities not within its common-carrier duty and to act *as a private or commercial warehouseman when the amounts received* * * *" (R. 110–111.)

"We shall deal first with warehousing operations of the respondents * * * which are in all respects *voluntary commercial warehousing activities such as 'are performed throughout the country by commercial warehousemen under and pursuant to their private contracts, arrangement and dealing with patrons of warehouses.'*" (R. 124.)

"*The engagement by the carriers in commercial warehousing* under circumstances described of record affects the performance of their common-carrier duties * * *" (R. 180.)

"* * * *those respondents* (appellants herein) *have departed from the business of transportation and entered the business of commercial warehousing.*" (R. 191.) (Italics in the foregoing quotations have been supplied.)

The extent to which Appellants have gone in their warehousing and storage undertaking is indicated by the following findings of the Commission:

"At the time of the further hearing at least 22 warehouse companies operated cold-storage warehouses in that district. Up to the close of the year 1930, the cold storage industry had placed 33,688,546 cubic feet of refrigerated space on the market in that district, and within a period of three years thereafter warehouses affiliated with the Erie and Pennsylvania placed an additional 8,500,000 cubic feet of refrigerated space on the market. This was an increase of about 25 percent over the amount of space that had been put on the market by all of the public warehouses in that district during the preceding period of 50 years or more. At the time these two warehouses were opened for operation there was an unused occupancy of at least 30 percent of the then existing facilities, and at the time of the further hearing there was less than a 50 percent occupancy. This excess capacity and resulting competition have reduced the cold-storage warehouse rates for handling and storage to subnormal levels. At the time of the further hearing at least 43 warehouse companies operated merchandise warehouses, other than cold storage, in the Port of New York district. During a period of 70 years up to that time, these warehouse

> companies had placed 20,450,000 square feet of warehouse space on the market in that district, and within six years subsequent to January 1, 1929, the respondents or their affiliates placed 6,185,000 square feet of new additional merchandise warehouse space on the market, thereby, without commercial need, increasing the capacity at least 25 percent." (R. 125–126.)

Appendices I, II and III to the Commission's first report (R. 113–115) further illustrate the extent of the commercial warehousing and storage practices of the Appellants. As stated by the Commission:

> "By referring to appendix I it will be noted that seven of the carriers have expended over $36,000,000 in connection with the warehouse projects considered herein, and appendix II shows the loss incurred thereon during 1931 was over $1,260,441. Appendix III shows the loss per ton of freight stored in-transit ranges from $1.28 to $6.18. These losses are added to by losses incurred on freight stored on railroad piers, and in carry on insurance premiums, and from loans and advances. The private warehouse interests estimate the total annual losses to be $3,152,119.63." (R. 112.)

The first two reports of the Commission are replete with specific findings that Appellants are engaged in the commercial warehousing and storage business on a scale and under circumstances not related to transportation, except as a traffic-soliciting device. (See for example with reference to warehousing and leases R. 128, 129, 135; 71, 138, 142, 144; 56, 153; 52–53, 156–157, 159; 87; 77–78, 81, 167, 169, 172, 173, 175.)

The findings above quoted, as well as those referred to, indicate conclusively the commercial and non-transportation nature of Appellants' warehousing and storage operations. They show that the problem is not that of isolated leases of surplus space or occasional or incidental storage. The practices shown constitute commercial enterprise on a gigantic scale.

So-Called In-Transit Storage.

Inasmuch as Appellants have contended at length in their Brief (Appellants' Brief, pages 36 to 39) that their so-called in-transit storage was not found by the Commission to be and is not in fact part of the non-transportation business undertaken by Appellants, an analysis of the Commission's findings on this point follows:

Carriers commonly permit the stopping of goods at an intermediate point en route and the reshipment therefrom to final destination at the through rate instead of the higher combination of local rates to and from the transit point. Ordinarily this privilege is granted to enable milling, manufacturing or other trade process at the transit point. Such storage as occurs during the transit period is incidental to the purposes of the detention. What is done to the goods at the transit point whether they be milled, manufactured or subjected to other trade process, is not done by the carrier. The privilege granted by the carrier is fundamentally the privilege of the through rate.

> See *Central Railroad Company* v. *United States*, 257 U. S. 247, 257 (1921).

It is clear that describing in tariffs a privilege as an "in-transit" privilege does not make it a transportation service, any more than describing in tariffs warehouses as public freight stations makes them public freight stations.

> *Merchants Warehouse Company* v. *United States* (*supra*) at 508;

see also:

> *United States* v. *American Tin Plate Company* (*supra*) at 408.

Should the carriers undertake to manufacture, mill or process at the transit point goods carried, the service would clearly not be transportation. It would be a commercial service regardless of the name by which called.

While storage may be incident to transportation it may also, as hereinbefore pointed out, constitute a commercial business. The Commission has found that in the instant case so called storage in-transit does constitute a commercial business.

In its first report, the Commission distinguished real in-transit privileges from the commercial practices engaged in by Appellants under the guise of an in-transit tariff, and found:

> "Each of the seven trunk-line respondents provide transit rules and rates for the storage of westbound freight at their warehouses in the Port of New York district, but these rules and rates vary greatly from the generally accepted storage in-transit practices in the following particulars. The owners of the stored freight may, and often times do, sell it locally, remove it by trucks or other means, withdraw it from consumption at any time or in any quantity by means suiting their business needs or inclination. Furthermore, if the goods remain in storage beyond the time limit imposed for in-transit storage the rates for storage remain the same as applied during such period. In the particulars named the storage partakes of the nature of commercial storage, and the storage involved is not, properly speaking, in-transit storage. The fact that it is designated as such in the carriers' tariffs does not invest it with the characteristics of in-transit storage." (R. 105.)

In its second report the Commission further emphasized the commercial warehousing nature of Appellants' so-called in-transit services, and made the following findings:

> " * * * the record is clear that those and other commodities are stored under circumstances which are not *bona fide* transit arrangements necessarily related to transportation services which it is the duty of the respondent carriers to perform. The circumstances and practices referred to are a part of the business necessary in conducting a commercial-warehouse enterprise. The engagement by the carriers in commercial warehousing under the circumstances described

of record, affects the performance of their common carrier duties and is of such character as to result in violation of the act which we are charged with administering. Prior report page 195." (R. 180.)

"Goods, including rubber, stored under the so-called transit tariffs, are unloaded from shipside and moved to warehouses under local rates. The goods remain in storage under so-called "expense bills." If shipped outbound from storage within the transit period, a refund is made of the local inbound freight charges, since the same through rate applies from shipside as from the warehouse. In spite of the fact that the storage of large quantities of certain of those commodities at the Port of New York was shown in the prior report to be a burdensome expense upon them, the respondents after the first hearing adopted the practice of extending the expiration date of the expense bills, thereby allowing the freight to remain in storage under the transit rates for longer periods than previously permitted. *The reason given for this extension is that because of the generally depressed condition of business, the owners of freight stored under the transit arrangements are unable to sell their commodities and move them from the warehouses.*

"The time limits were generally extended for 6-month periods, and through such practice it was possible for crude rubber to be stored a maximum of 30 months, unmanufactured tobacco 36 months, paraffin wax 24 months, and burlap, pig tin, cocoa beans, pepper, and senna leaves 18 months. * * * On May 20, 1935, however, the carriers extended the time limit an additional six months on expense bills covering paraffin wax. The above limits represent the time which the goods may remain in storage and receive the advantage of the through rate from shipside to destination. *If the goods remain in storage for longer periods the storage rates remain the same, but the shipment is considered a local shipment from the transit point.*

"When the prior report was issued, respondents' tariffs permitted the removal of commodities stored under transit storage rates at any time, in any quantity, and by any means of transportation. Effective October 16, 1934, a charge of 5 cents per 100 pounds in addition

to the accrued storage-in-transit charges was made to apply on commodities withdrawn from storage for movement by means other than over the railroad which granted the storage." (R. 181–182.)

"Numerous consuming points of the commodities previously mentioned are located within comparatively short distances from the Port of New York district. Present-day commercial necessities in the distribution of goods to a densely populated section require large amounts of warehouse space as a storage reservoir from which the goods may be drawn promptly and economically for consumption. It is a distinct commercial advantage to dealers and manufacturers to have storage facilities available at a central distributing point, rather than at scattered points, and *commercial reasons account for the large tonnage of goods stored in the above district.*" (R. 188.)

"So far as this entire record shows, none — or practically none — of the westbound goods stored under the present tariffs are held to permit a milling, manufacturing, or other similar trade process to be performed, but are held in that convenient locality awaiting a time when it will be to the commercial interest of the owner to sell or further ship the goods. This is clearly proven by the fact that the transit period has been extended from time to time by the respondents because of inability of the owner of the goods to dispose of them, by reason of economic conditions. *The storage of commodities for the convenience of shippers while markets are being sought is not properly a carrier's function.*" (R. 189.)

"*The fact that the carrier's tariffs designate the storage as in-transit storage was considered in the prior report, but we found that such designation did not invest this storage with the characteristics of storage in-transit.* Tariffs are but forms of words, and in administering the act we can look beyond the forms to what causes them, and what they are intended to cause and do cause." (R. 190.)

"The consideration upon further hearing given to storage, under the tariffs now effective, in railroad owned or controlled warehouses, of the commodities

which have been mentioned in this report under the heading Storage of Westbound Carload Freight at New York, and others not specifically named herein, but similarly stored as described of record, leads us to affirm our previous findings and to here find that, to the extent that the respondents engage in the storage of those commodities under the practices heretofore discussed, those *respondents have departed from the business of transportation and entered the business of commercial warehousing.*" (R. 190–191.) (Italics in the foregoing quotations have been supplied.)

Appellants have urged in their brief that in its third report the Commission held that so-called in-transit storage was a transportation service in that it modified a prior order requiring the cancellation of the so-called in-transit tariffs.

This modification was made upon Appellants' petition for leave to continue the publication of its storage in-transit tariffs. (R. 270.) The petition was granted, but notwithstanding this the Commission clearly reasserted its previous finding and stated:

"*What is here condemned is the fact that the respondents have voluntarily engaged in storage and warehousing services* which are not within their common-carrier obligations, and by providing such services to shippers below the cost of such services, reduce the cost to such shippers for the transportation of their goods. *The tariffs now on file are instruments which work violations of the act, in that through them respondents hold themselves out to perform commercial services* (under the guise of performing transportation services) at rates and charges which fail to compensate respondents for the cost of performing them, and thereby violate sections 2, 3 and 6 of the act:" (R. 271.) (Italics supplied.)

Whether the Commission was right in permitting the filing of these tariffs is not a matter of concern now. The Appellants were the moving parties in this regard. They requested permission to continue the filing of the tariffs. If the granting of the permission would, without more, have raised doubt as to certain prior findings of the Commission, that

doubt was removed by the above-quoted unequivocal language of the Commission's final report.

As hereinbefore stated, storage at a transit-point can be a commercial undertaking just as is milling or manufacturing. Whether or not such storage is a commercial undertaking, is a question of fact to be determined from all the circumstances by the Commission. Among the circumstances considered by the Commission in the instant case were the unlimited duration of the low-cost storage period (notwithstanding the expiration of the transit period), the application of the same storage rates notwithstanding the non-exercise of the transit privilege, the extent of the facilities so afforded, and the trade reasons for the granting thereof. The Commission has found the fact and its finding is final.

2. The commercial warehouse and storage services so rendered by Appellants are rendered at rates and charges below the cost to Appellants of furnishing the same.

The Commission's finding that Appellants' warehousing and storage operations are conducted below cost has not been challenged in any respect.

The Commission has found that each of the Appellants furnishes commercial warehouse and storage services to certain shippers below cost. (For illustrative findings with reference to each of Appellants, see re The Baltimore & Ohio Railroad Company, R. 129–130, 134, 135; re The Delaware, Lackawanna & Western Railroad Company, R. 136, 137–138; 144–145; re Lehigh Valley Railroad Company, R. 151–152; re The Central Railroad Company of New Jersey, R. 157, 159; re Erie Railroad Company, R. 164; re The New York Central Railroad Company, R. 168, 169; re The Pennsylvania Railroad Company, R. 174, 175. For illustrative findings with reference to so-called storage in-transit services see R. 185–188; 196–197.)

3. The commercial warehouse and storage services so rendered are made available by Appellants for the purpose of inducing traffic movement over their respective lines.

Here again the reports of the Commission are replete with findings that the motive of Appellants in furnishing commercial warehouse and storage services below cost is the inducement of traffic movement over their lines. (For example, see generally R. 35; and see re The Baltimore & Ohio Railroad Company, R. 128, 130–134; re The Delaware, Lackawanna and Western Railroad Company, R. 136–137, 140–141; re Lehigh Valley Railroad Company, R. 149, 152; re The Central Railroad Company of New Jersey, R. 155; re Erie Railroad Company, R. 163, 164; re The New York Central Railroad Company, R. 168; re So-called Storage in-Transit, R. 182, 190).

The following finding by the Commission is illustrative:

> "*The motive of the carriers in engaging in the commercial business is to induce shippers to use their rail facilities, and thereby increase the volume of traffic over their respective lines.* The lower the aggregate charges for transportation and storage or warehousing services the greater the inducement. * * * It appears of little concern to the railroads that the charges for the warehousing services and space furnished are not compensatory, because they expect to recoup any losses through the revenue derived from rail transportation. * * * The conflict of interests is not confined to rail carriers and private warehousemen, but concerns also the rail carriers as between themselves. The record plainly shows the struggle between the different rail carriers for supremacy in the matter of inducements without due regard for expenditures and profitableness of the business." (R. 105–106.) (Italics supplied.)

4. Not all shippers over Appellants' lines receive these commercial services. Some shippers, including competitors of Appellants in the warehouse and storage business, are substantially injured thereby.

(a) Not all shippers receive Appellants' commercial services.

Many shippers have no need for Appellants' commercial warehouse and storage services, and do not use the same.

As found by the Commission:

"Although the carriers charge all shippers alike t tariff rates for rail transportation, it is obvious that t according of noncompensatory warehousing charges a rental to some shippers and not to all is equivalent to deduction from the charges for transportation to s shippers and not to others for like and contemporaneo service. This is clearly prohibited by section 2 of t act. *It is likewise clear that the shippers receiving benefit of such noncompensatory charges are given un preference or advantage in violation of section 3 (1) the act, over shippers who have no need of warehou or storage, or others who for various reasons are compell to pay the line-haul rate undiminished by any such benefit.*" (R. 108–109.)

"In the instant case it is established that *th persons who are able to avail themselves of storage a* handling at the carrier's noncompensatory rates, a whose costs from shipside to destination are there reduced by the amount of the difference between compe satory rates and the noncompensatory rates, *recei an undue and unreasonable preference or advanta over those persons whose commercial practices will n permit of their placing their goods in storage at Ne York, but require direct shipment from shipside to dest nation.* Not only is the latter class of persons undu or unreasonably prejudiced or disadvantaged, but suc prejudice and disadvantage extends to all person who are compelled to bear the carriers' transportation rates which are dissipated by their storage practices." (R. 192.)* (Italics in the foregoing quotations have been supplied.)

* Crude Rubber is one of the principal commodities stored under so-called in-transit tariffs (R. 180), yet the Commission has found:

"About 50 percent of the crude rubber imported through the Port of New York consists of so-called 'licensed rubber', sold on the rubber exchange, none of which is stored in railroad-owned or controlled warehouses. Of the remaining 50 percent, a considerable amount does not go into storage at New York, but is shipped directly from shipside to destination. The portion stored in respondents' warehouses is owned either by manufacturers or by rubber dealers and brokers." (R. 180.)

Shippers of this rubber do not receive the benefits of the below-cost service.

Furthermore, the Commission has found Appellants' commercial services are not only not of use to all shippers, but larger shippers are intentionally favored by Appellants:

> "*The rail carriers* directly or through dominated and controlled subsidiaries *seek out the larger shippers and offer them lower rates* for warehousing services and warehouse space than the private warehousemen * * * The conflict of interest applies also as between larger shippers, controlling sufficient traffic to enable them to use the carrier-controlled warehousing facilities at noncompensatory rates, and smaller shippers who must pay the tariff rates for rail transportation and of necessity use the private warehousing facilities at higher rates than are charged by the carrier-controlled warehouses. It should be borne in mind that certain carrier-controlled warehousing facilities are not available to the general public, but only to selected concerns controlling large volumes of traffic. The tariffs provide that arrangements for storage space for westbound shipments in or on railroad piers or warehouses must be made in advance with respondents, or with outside warehouses if stored therein." (R. 105–106.) (Italics supplied.)

The Commission summarized its findings in this regard as follows:

> "The present rates and practices of the rail carriers, as considered herein, cannot be justified upon the ground that the aggregate charges are not unreasonable as not all shippers are accorded the same aggregate charges for like and contemporaneous services." (R. 110.)

(b) Substantial injury to shippers results from Appellants' commercial practices.

That shippers generally who are unable to use Appellants' commercial services are injured appears from the quotations from the Commission's reports hereinbefore made.

Among the shippers most seriously injured are competing warehousemen.

The Commission found with regard to these warehousemen:

> "The private warehouse companies are 'persons' within the meaning of that word as used in sections 2 and 3 of the Interstate Commerce Act * * * As *shippers* they are to be dealt with in accordance with the provisions of the Act." (R. 109–110.) (Italics supplied.)

> "Numerous warehouse operators and associations composed of individuals engaged in various branches of warehousing appeared and were heard at both hearings in this case. The evidence adduced by such operators at the first hearing is summarized in the prior report, at page 189. Cumulative evidence, discussion of which is unnecessary, was given at the later hearing. At page 190, we said:
>
> 'Complainants offered testimony and exhibits, neither of which was refuted by respondents, which show that *they have lost business in practically every form of warehousing to the respondents' affiliated warehouse and storage companies.* They claim that a large part of the value of their warehouse properties has been confiscated and destroyed by the practice of the trunk lines, in what they consider trade activities and not common-carrier service.'" (R. 126.) (Italics supplied.)

> "It was urged on behalf of the complaining warehousemen that the engagement of the respondents in the business of commercial warehousing would ultimately drive such warehousemen out of business, and result in a monopoly by the respondents of commercial warehousing in the Port of New York district. There appears to be a basis for their fears, * * * ." (R. 191.)

Illustrative of specific findings by the Commission are the following two quotations from its second report:

> "The testimony shows, and it is almost self-evident, that commercial warehousing companies engaged in the storage of automobiles received in carload lots by rail are unable to successfully compete for that business

when faced by the competition of the storage companies subsidized by the New York Central." (R. 168.)

"The record is conclusive that through existing arrangements the respondents have provided flour-storage space at less than cost. In fact, it was testified at the former hearing that, through the practice of respondents in leasing their storage facilities to trucking or stevedoring companies, it is possible for flour merchants in New York City to avoid bearing any expense for such storage. Under such circumstances it is of course clear that the operators of commercial warehouses are unable to compete successfully for the business of storing flour. Those operators are 'persons' within the meaning of that word as used in sections 2 and 3 of the act, and must be dealt with in accordance with the provisions of those sections." (R. 176-177.)

It appears from the foregoing that the Commission has found that:

1. Each of the Appellants is engaged in the warehouse and storage business in the Port of New York District and is rendering in the course of that business, warehousing and storage services to certain shippers in interstate commerce over their lines;

2. These services are rendered at less than the cost to Appellants of furnishing the same;

3. These services are made available for the purpose of inducing the movement of traffic over the Appellants' respective lines; and

4. Not all shippers over Appellants' lines receive these services, but some, including Appellants' competitors in the warehouse and storage business, are substantially injured thereby.

The Commission having made these findings of fact, the facts found are conclusively established. They are basic facts which justify the order of the Commission.

POINT II.

The order of the Commission is valid in that the rendering by Appellants of warehouse and storage services to certain shippers at less than the cost to Appellants of the services so rendered, while Appellants are engaged in the commercial warehousing and storage business, is unjustly discriminatory of and unduly prejudicial to competitors of Appellants in the commercial warehousing and storage business, in violation of sections 2 and 3 of the act, and constitutes a departure from their published transportation rates in violation of section 6.

A carrier may not, when engaged in competition with others who are shippers over its line in a commercial business wherein shipment of goods by it is involved, meet losses from its commercial business out of its transportation revenue without unjustly discriminating against and unduly prejudicing such shippers in violation of sections 2 and 3 of the Act, and without departing from its published transportation rate in violation of section 6.

This principle was definitely established by this Court in *New York, New Haven and Hartford Railroad Company v. Interstate Commerce Commission*, 200 U. S. 361 (1906).

The facts in that case were as follows:

The Chesapeake and Ohio Railroad was engaged in the business of selling coal and in the business of transportation. On December 3, 1896, it entered into a written contract with the New Haven Railroad to sell coal to the latter between July 1, 1897, and July 1, 1902, as required by the New Haven, but not in excess of 2,000,000 gross tons in all and not in excess of 400,000 gross tons in any year. (This was

a five-year transaction, not a contemporaneous purchase and sale transaction as suggested in Appellant's Brief, pages 24, 25.) The price agreed upon was $2.75 per gross ton, New Haven basis. The coal was to be delivered by the seller on the line of the New Haven. The Chesapeake and Ohio operated a line from its coal mines to Newport News over which the coal was to be shipped. From there it was moved by boat to New Haven. At the time this contract was made the sum of $2.75 was not sufficient to pay the cost to the Chesapeake and Ohio of the coal at the mines, the cost of movement from Newport News to New Haven and the published rate of the Chesapeake and Ohio from the mines to Newport News. Deliveries were made under the contract up to the winter of 1900–1901, when deliveries ceased due to strikes and other difficulties. The New Haven bought coal in the open market at an enchanced price and was later reimbursed by the Chesapeake and Ohio for its loss. (It should be noted that the price paid by the New Haven on the open market was paid during a period of difficulty and was not for a five year's supply. It is therefore no indication that the price paid under the contract was below the market price of the coal, as suggested by Appellants in their Brief, pages 24 and 25.) Subsequently in 1902, deliveries again ceased at a time when about 60,000 tons remained yet to be delivered. The New Haven presented the Chesapeake and Ohio with a bill for damages in the amount of $103,000. Thereupon in 1903, a new contract was entered into whereby the Chesapeake and Ohio agreed to deliver to the New Haven 60,000 tons of coal from the Kanawha District and the New Haven agreed to discharge its claim against the Chesapeake and Ohio and to pay $2.75 a ton for the coal so delivered. At the time this agreement was made, the contract price, leaving out of view the claim for damages, was inadequate to pay the cost to the Chesapeake and Ohio of the coal at the mines, the cost of delivery from Newport News to New Haven and the published transportation charge from the mines to Newport News.

Following an inquiry made upon complaint, the Commission brought a proceeding in the Circuit Court alleging that *both* contracts were discriminatory and in violation of the Act and sought an injunction against performance.

It was contended in defense that the contract of 1903 was valid because the purchase price of the coal was not merely $2.75 a ton, but that sum plus $103,000, the amount of the damages, the claim for which was to be discharged. It was further contended that, if any loss was suffered by the Chesapeake and Ohio, it was suffered in the coal business, as the contract price clearly was sufficient to pay the published transportation rate, and that the purchase price should first be imputed to that rate.

The Circuit Court issued an injunction and an appeal was taken to this Court.

This Court found, on the facts above stated, a violation of sections 2, 3 and 6 of the Act and continued the injunction. In so holding, this Court said at pages 390 to 399:

> "The question, therefore, to be decided is this: has a carrier engaged in interstate commerce the power to contract to sell and transport in completion of the contract the commodity sold, when the price stipulated in the contract does not pay the cost of purchase, the cost of delivery and the published freight rates? * * *
>
> "It cannot be challenged that the great purpose of the act to regulate commerce, whilst seeking to prevent unjust and unreasonable rates, was to secure equality of rates as to all and to destroy favoritism, these last being accomplished by requiring the publication of tariffs and by prohibiting secret departures from such tariffs, and forbidding rebates, preferences and all other forms of undue discrimination. To this extent and for these purposes the statute was remedial and is, therefore, entitled to receive that interpretation which reasonably accomplishes the great public purpose which it was enacted to subserve. * * * The all-embracing prohibition against either directly or indirectly charging less than the published rates shows that the purpose of the statute was to make the prohibition applicable to every method of dealing by a carrier by

which the forbidden result could be brought about. If the public purpose which the statute was intended to accomplish be borne in mind, its meaning becomes, if possible, clearer. What was that purpose? It was to compel the carrier as a public agent to give equal treatment to all. *Now if by the mere fact of purchasing and selling merchandise to be transported a carrier is endowed with the power of disregarding the published rate, it becomes apparent that the carrier possesses the right to treat the owners of like commodities by entirely different rules.* That is to say, the existence of such a power in its essence would enable a carrier, if it chose to do so, to select the favored persons from whom he would buy and the favored persons to whom he would sell, thus giving such persons advantage over every other, and leading to a monopolization in the hands of such persons of all the products as to which the carrier chose to deal. Indeed the inevitable result of the possession of such a right by a carrier would be to enable it, if it chose to exercise the power, to concentrate in its own hands the products which were held for shipment along its line, and to make it, therefore, the sole purchaser thereof and the sole seller at the place where the products were to be marketed; in other words, to create an absolute monopoly. *To illustrate: if a carrier may by becoming a dealer buy property for transportation to a market and eliminate the cost of transportation to such market, a faculty possessed by no other owner of the commodity, it must result that the carrier would be in a position where no other person could ship the commodity on equal terms with the carrier in its capacity of dealer. No other person owning the commodity being thus able to ship on equal terms, it would result that the owners of such commodity would not be able to ship, but would be compelled to sell to the carrier.* And as by the departure from the tariff rates the person to whom the carrier might elect to sell would be able to buy at a price less than any other person could sell for, it would follow that such person so selected by the carrier would have a monopoly in the market to which the goods were transported.

"And the considerations previously stated serve also to demonstrate that the prohibitions of the act to regulate commerce concerning '*undue or unreasonable preference or advantage*,' '*undue or unreasonable prejudice*

or disadvantage' and *'unjust discrimination'"* are in conflict with the asserted right of a carrier to become a dealer in commodities which it transports, *and as such dealer to sell at a price less than the cost and the published rates.* Certain also is it, when the reasons previously stated are applied to those prohibitions of the statute, the possession of the power by a carrier to deal in merchandise and to sell and transport at less than published rates, would not only destroy the remedy intended to be afforded by the provisions in question, but would cause the statute to fructify the growth of the wrongs which it was intended to extirpate * * *.

"It is said that when a carrier sells an article which it has purchased and transports that article for delivery, it is both a dealer and a carrier. When, therefore, the price received for the commodity is adequate to pay the published freight rate and something over, the command of the statute as to adherence to the published rates is complied with, because the price will be imputed to the freight rate, and *the loss, if any, attributed to the company in its capacity as dealer and not as a carrier.* This simply asserts the proposition which we have disposed of, that a carrier possesses the power, by the form in which he deals, to render the prohibitions of the act ineffective, since *it implies the right of a carrier to shut off inquiry as to the real result of a particular transaction on the published rates, and thereby to obtain the power of disregarding the prohibitions of the statute* * * *.

"*It is urged that* if the requirements of the act to regulate commerce as to the maintenance of published rates and the prohibitions of that act against undue preference and discriminations be applied to a carrier when engaged in buying and selling a commodity which it transports, *the substantial effect will be to prohibit the carrier from becoming a dealer* when no such prohibition is expressed in the act to regulate commerce, and hence a prohibition will be implied which should only result from express action by Congress. Granting the premise, the deduction is unfounded. Because no express prohibition against a carrier who engages in interstate commerce becoming a dealer in commodities moving in such commerce is found in the act, *it does not follow*

that the provisions which are expressed in that act should not be applied and be given their lawful effect." (Italics supplied.)

Extensive quotations from the New Haven decision have been made to dispel any doubt which Appellants may have raised with regard to the applicability of that case to the facts in the instant case.

In the instant case, the Commission has found that the carriers are engaging in two businesses — (1) commercial warehousing and storage, and (2) transportation. In the *New Haven* case (*supra*) the Chesapeake and Ohio was engaged in two businesses, (1) selling coal and (2) transportation.

In the instant case, the Commission has found that the charges of Appellants for the warehousing and storage services rendered by them are below cost and that these costs are improperly met out of their published transportation charges. In the *New Haven* case the Chesapeake and Ohio was selling coal below cost and this Court held that these costs could not properly be met out of the published transportation charges. To meet its costs out of the published transportation charges, constituted, in the opinion of this Court, in the *New Haven* case, violations of sections 2, 3 and 6.

The discrimination found in the *New Haven* case was not, as Appellants have suggested, merely a discrimination in favor of the New Haven. The discrimination found was a discrimination against other shippers engaged in the coal business who were not engaged in the transportation business and who were therefore compelled to pay the full transportation charge.

In the instant case, it has been found that non-carrier warehousemen engaged in the warehousing and storage business are shippers over the lines of Appellants (R. 110) and competitors of Appellants in the commercial warehousing and storage business. (See, for example, R. 126.)

These shippers must pay the full transportation charges on goods shipped by them over Appellants' lines. They may not recoup their losses from the transportation rates.

When Appellants absorb their commercial losses in their transportation rates it follows necessarily, and the Commission has found, that they are discriminating unjustly against such warehousemen in violation of section 2, unduly prejudicing such warehousemen in violation of section 3 and indirectly departing from their (the Appellants') published transportation charges in violation of section 6. (R. 108–109; 110–111; 191–192.)

It cannot be validly urged, as Appellants appear to have contended in their brief (Appellants' Brief, pages 18 to 33), that, unless Appellants charge less than market value for their commercial warehouse and storage services, the Act cannot be violated. Not only is a criterion of reasonable worth under the circumstances meaningless, since the railroads can and do by their extensive commercial practices prevent a stable market (R. 125–126), but such a criterion has no applicability here. The discrimination which is unjust and the prejudice which is undue arise from the fact that Appellants absorb their losses in their published transportation rate, whereas their competitors in the warehouse business are unable so to do, as was the case of the competitors of the Chesapeake and Ohio in the coal business. Appellants' competitors must pay the published transportation rate undiminished.

Appellants have further contended (Appellants' Brief, pages 36 to 43) that warehouse and storage below-cost services rendered under their so-called in-transit tariffs cannot be discriminatory or prejudicial because open to all shippers alike, and cannot constitute a departure from their published rates in violation of section 6 because of the fact of publication.

These contentions will be considered further in Point III B (2) of this brief (pages 40 to 42, *infra*). It is here pointed out, in summary, that there is no merit to this contention

of Appellants. Even if these services of Appellants were technically open to all, they are of no practical value, but are, on the contrary, damaging to competing warehousemen who must pay the full transportation rates undiminished through absorption of their commercial losses. They are clearly discriminatory and prejudicial in fact, notwithstanding any provision in Appellants' tariffs.

Moreover, the warehouse and storage services rendered under Appellants' so-called storage in-transit tariffs are non-transportation services rendered in the course of Appellants' commercial warehouse and storage undertaking. (See Point I B 1, *supra*, pages 15 to 20.) As they are non-transportation services, tariff references thereto cannot create an obligation to render them. The Commission has found that they are not in fact, or even in terms, open to all. (R. 105–106.) Not being open to all, the argument of Appellants based on their openness, can have no validity. The Commission has found that these storage services have injured competing warehousemen. (See for example, R. 105.)

Furthermore, being non-transportation services, the fact that they are published does not prevent their below cost nature operating as a departure from the transportation rate. In *United States* v. *American Tin Plate Company*, 301 U. S. 402, 408 (1937), this Court held that publication of allowances for non-transportation services did not prevent a departure from the transportation rate in violation of Section 6 (7). The allowances had to be met from the transportation rate. This caused the departure. Similarly, in the instant case, the publication of below-cost charges for commercial warehousing and storage services does not prevent a departure from Appellants' published rate for transportation services. The losses from these non-transportation services must be met from the transportation rate. This causes the departure.

POINT III.

The order of the Commission is valid in that the rendering by Appellants of commercial warehouse and storage services to certain shippers at less than cost for the purpose of inducing the movement of traffic over Appellants' lines is unjustly discriminatory of and unduly prejudicial to all shippers who receive similar transportation services but do not receive the services so afforded in violation of sections 2 and 3 of the Act and effects a departure from their transportation rates in violation of section 6.

In Point II it has been urged that a carrier may not, when engaged in a commercial business involving shipments over its line and in which shippers over its line are competitors, absorb losses from its commercial business in its transportation revenue without unjustly discriminating against and unduly prejudicing such competitors, in violation of sections 2 and 3 of the Act and without departing from its published transportation rate in violation of section 6.

Under the present heading it is contended that the practices of Appellants described above unjustly discriminate against and unduly prejudice, not merely their competitors in the commercial warehouse and storage business, but all shippers over their lines who receive similar transportation services but do not receive the non-transportation services afforded, and result in departures from their transportation rates.

A. Appellants may not render the commercial services under consideration for the purpose of inducing traffic movement over their lines.

The present case is indistinguishable in principle from that presented by *Lehigh Valley Railroad Company* v. *United States*, 243 U. S. 444 (1917).

It there appeared that Sheldon and Company was a forwarder of imported goods. It entered into a contract to ship, as far as possible, goods forwarded by it from abroad over the Lehigh Valley Railroad; to maintain offices in the United States and abroad; to advertise the railroad and to solicit for it. The Lehigh Valley agreed, in consideration of these services, to pay Sheldon and Company $5,000 annually, and an allowance of a varying percentage of the published rate on goods shipped over the Lehigh Valley line. An injunction was issued restraining all payments to Sheldon and Company under the contract. On appeal this Court sustained the injuction.

The carrier contended in its appeal that the services which Sheldon and Company was rendering to it were connected with transportation and that the sum it was to be paid thereunder was reasonable and not in excess of the fair value of its services. The contention was that Sheldon and Company was paid for a service which the carrier was entitled to have rendered and, as the payment was not in excess of the value of the service, Sheldon and Company obtained no real concession.

This Court said with regard to the profitableness of the arrangement to Sheldon and Company:

> "Of course the expectation is that it will make a profit from the transaction, although from the uncertainty of the arrangement *it may lose.*" (page 445.) (Italics supplied.)

The carrier's defense was rejected, this Court stating at page 446:

> "* * * any payment made by a carrier to a shipper in consideration of his shipping goods over the carrier's line comes within the prohibiting words.

> "It is true no doubt that George W. Sheldon and Company in the performance of the services for which it is paid maintains offices here and abroad, advertises the Railroad, solicits traffic for it, does various other useful things, and, in short, we assume, benefits the road and earns its money, if it were allowable to earn money in that way."

The *Lehigh Valley* case, while the converse of the instant case, is plainly applicable. In the *Lehigh Valley* case, Sheldon and Company, a shipper, was given money by the railroad for non-transportation services with the view of inducing the movement of traffic over the road. Other shippers were not so treated. In the instant case, the Appellants render non-transportation services to some shippers but not to all at a loss and with the same view of inducing traffic. Sheldon and Company claimed that, while money was paid out by the railroad, Sheldon and Company received no more than the services rendered were worth. There was in fact no finding that Sheldon and Company had made a profit. This Court found that circumstance was not controlling. Appellants assert here that although the carriers have paid out money there is no finding that shippers have received more in value than they have paid for. The answer in the instant case, as in the *Lehigh Valley* case, must be that the fact of profit is not controlling. Traffic cannot be so bought.

The Commission, having found that the discrimination and prejudice violative of the Act arise from the below-cost performance of commercial services, properly forbade continuance of such services below cost.

Merchants Warehouse Company v. *United States*, 283 U. S. 501 (1937).

B. Appellants' below-cost commercial services constitute a departure from their transportation

rates and unjustly discriminate against and unduly prejudice all shippers not receiving such services.

If the published rate for transportation between points A and B is $10 and a carrier pays $3 out of its treasury to a certain shipper over said route in order to induce the shipper to use the carrier's line, such payment would constitute a violation of sections 2, 3 and 6 of the Act. This is the simplest illustration of a forbidden rebate.

United States v. *Union Stock Yards*, 226 U. S. 286 (1912).

Similarly, if a carrier pays out of its treasury $3 for a commercial service which it renders to the shipper without charge, to induce him to use the carrier's line, the rendering of such service clearly would constitute a violation of said sections.

Central of Georgia Ry. Co. v. *Blount*, 238 Fed. 292 (CCA-5) (1917).

If instead of rendering such service free, a carrier, all other circumstances being the same, receives a return from the shipper of $1 for the non-transportation service costing $3, it is submitted that there is equally a violation of sections 2, 3 and 6. The carrier has lost $2 as a result of its commercial service. This it must take from its line-haul rate. There is no other source. The carrier thus reduces its line-haul by $2 and receives in effect and through indirection $8 and not $10 therefor. A departure from its line-haul rate, in violation of section 6, necessarily results. Moreover, transportation for the shipper receiving the less-than-cost service for $8 instead of $10, while other shippers who do not receive the less-than-cost commercial

service must pay the $10 rate undiminished, constitutes a violation of sections 2 and 3.

This it is submitted follows from the decision in *New York, New Haven and Hartford Railroad* v. *United States* (*supra*) discussed under Point II.

(1) Such violation of the Act exists irrespective of whether below-cost services are afforded at rates below their reasonable worth.

Appellants contend, in substance, that sections 2, 3 and 6 are not violated under the circumstances set forth above; that, in effect, even though a carrier pays out of its treasury $3 for a service given to a shipper for $1, in order to induce that shipper to use the carrier's line, there is no unjust discrimination or undue prejudice unless it appears that the reasonable worth of what the shipper receives exceeds the sum he pays therefor (see Appellants' Brief, pgs. 18-33), and this despite the fact that, in such a situation, the carrier ultimately receives less for the transportation of the shipper's goods to the extent of its loss on the non-transportation service than it receives from other shippers for the same transportation service.

Appellants' contention is that there can be no "concession" to a shipper unless "the shipper really got something of value that he did not pay for" (Appellants' Brief, page 18), and that the Commission has not found that shippers receiving the benefit of Appellants' commercial services pay less than the reasonable worth thereof. Without inquiring into the validity of Appellants' contention as to what the Commission found in regard to reasonable worth (compare R. 105, 126, 168, 176-177, 191), it is submitted that the contention that there can be no "concession," unless the shipper obtains more in value than he has paid for, is untenable.

Such a contention is flatly refuted by the holding of this Court in *Lehigh Valley Railroad* v. *United States* (*supra*). There it did not appear that the shippers' contract with the

carrier secured a profit to the shipper or that there was not an equivalence between what the shipper received and the carrier gave. In fact this Court pointed out that the shipper might make no profit thereunder but might lose.

Moreover neither sections 2, 3 or 6, employ the term "concession." Section 2 forbids a carrier "directly or indirectly, by any * * * device," to "charge, demand, collect or receive from any person or persons a *greater or less* compensation for any service rendered or to be rendered, in the transportation of passengers or property * * * than it charges, demands, collects or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation * * * of a like kind of traffic * * * under substantially similar circumstances and conditions." Section 3 forbids undue preference and prejudice, and section 6 (7) forbids a carrier from receiving "*a greater or less or different compensation*" for transportation than that specified in its tariffs. (Italics supplied.)

A carrier obtains less *for transportation* from the shipper for whom it renders a non-transportation service below-cost than it does from the shipper for whom it does not render such services. The performance of such services constitutes, therefore, a violation of sections 2, 3 and 6 (7), regardless of whether the shipper has received a more valuable non-transportation service than he has paid for.

As stated by the Court below:

> "To the extent that the carriers are out of pocket because of the performance of such voluntary commercial services in connection with transportation furnished a shipper, their published tariff rates for such transportation are cut. We are now dealing with the requirement for the maintenance of the published tariff rates for transportation which the act makes applicable alike to all shippers under like circumstances, and, if the inducing commercial service which the carriers perform for some shippers to get or hold their business has the effect, as has been made to appear by the

evidence and has been found by the commission, of cutting those tariff rates because out of such rates a loss must be deducted to get the true net transportation return, *the transportation service is furnished by the carriers to those shippers for less than to others whether the loss deduction results from commercial services performed at their fair value or not.*" (R. 308.) (Italics supplied.)

Cases cited by Appellants to the effect that a carrier may not lease its surplus properties to shippers at less than the fair rental value in order to induce the movement of traffic over its lines have no bearing on the issue here involved. There was, of course, undue preference of such shippers. They obtained more than shippers not receiving the concessions, and sections 2 and 3 were violated. It does not follow that discrimination and prejudice may not arise in other ways.

The cases cited did not intimate that if fair value was received, though not cost, the carriers would not have violated sections 2, 3 or 6. No inference may be drawn, from the absence of a discussion in those cases of cost, that non-transportation services below cost were permissible. In those cases no cost problem was involved or required discussion.

Nor may any inference be drawn from the fact that cases are infrequent condemning below-cost operations. For carriers to engage in below-cost non-transportation activities on a substantial scale except when engaging, as here, in an independent commercial business is hardly to be expected as a common occurrence. The Commodities Clause, so-called (49 U. S. C., sec. 1 (8)), enacted shortly after the New Haven decision (*supra*) eliminated carriers from most commercial businesses. Infrequency of cases and discussion on the point now in issue supplementing the New Haven case is therefore to be expected.

(2) Such of Appellants' commercial services as are covered by their so-called in-transit tariffs are equally violative of the Act.

In addition to their contention that there can be no violation of sections 2, 3 or 6, unless the shippers receiving Appellants' commercial warehouse and storage services have received services more valuable than they have paid for, Appellants further contend that such of these commercial services as are rendered by them under the so-called storage in-transit tariffs cannot be violative of sections 2 or 3 of the Act because they are available to all shippers and cannot violate section 6, because the services and the charges therefor have been provided for in published tariffs.

Appellants' contention that by reason of their tariff publication the so-called storage in-transit services are available to all shippers, and therefore cannot be violative of sections 2 or 3 of the Act, is without validity.

The storage services rendered under these so-called in-transit tariffs are not transportation services. They constitute part of the commercial warehouse and storage undertaking of Appellants. (See Point I B 1 hereof *supra*, pages 15 to 20.) The fact that an agent of Appellants has written these services into the tariffs does not make them transportation services or create a duty on the part of Appellants to render them.

> *United States* v. *American Tin Plate Co.* 301 U. S. 402 (1937).

Moreover, the Commission has found that not only were these services not in fact afforded to all shippers but that the tariffs in terms do not so provide. (R. 105–106; see also Point I B 4 hereof *supra*, pages 21 to 25, and see especially page 23, *supra*.)

The argument of Appellants, therefore, that since the tariffs are open to all there can be no discrimination or prejudice, necessarily falls. They are not open to all. There can be both discrimination and prejudice. The Commission has found that discrimination and prejudice exist. (See, for example, R. 108–109; 110–111; 192.)

Even were the tariffs in question in fact open to all shippers, the service, being a non-transportation service, may, not-

withstanding the fact of theoretical availability, be violative of sections 2 and 3. The shipper who does not need the service or want it is not aided by its theoretical availability. He is under no duty to use the service. If he does not, he pays for his transportation the full published transportation rate. Other shippers using the non-transportation service pay the transportation rate diminished by the loss which the non-transportation service to them has occasioned.

Nor is Appellants' argument that, by reason of tariff publication, section 6 (7) cannot be violated on firmer ground.

A similar contention was made to and rejected by this Court in *United States* v. *American Tin Plate Company* (*supra*). The Commission had condemned allowances for certain spotting services on the ground that the services for which such allowances were made were non-transportation services. The Commission concluded that the allowances constituted a departure from the transportation rate in violation of section 6 (7) and forbade their continuance. It was contended before this Court, in opposition to the Commission's order, that inasmuch as the tariffs provided for the allowances there could be no departure in violation of section 6 (7). This Court held that as the allowances were for non-transportation service and as they must be met from transportation revenue, the transportation rate was departed from in violation of section 6 (7). The Commission's order was sustained.

In the instant case, the Commission has found that Appellants' so-called storage in-transit services are non-transportation services; that they are rendered below cost and that the loss is met out of the transportation rate. This the Commission found was violative of section 6 (7). The *American Tin Plate Company* case supports the Commission's conclusion, and its order should be sustained.

See also:

United States et al. v. *Pan-American Petroleum Corp. et al.*, 304 U. S. 156 (1938).

POINT IV.

The order is not invalid by reason of the Fifth Amendment to the Federal Constitution.

Since the order is a valid exercise of the Commission's power to prevent the continuance of Appellants' discriminatory and prejudicial conduct in violation of sections 2 and 3 of the Act, and to prevent departures by Appellants from their published transportation rates in violation of section 6, (see Points II and III *supra*) the order is a constitutional exercise of the Federal power to regulate commerce and does not violate the Fifth Amendment of the Federal Constitution. As stated by this Court in *Los Angeles Switching Case*, 234 U. S. 294 (1914) at page 313:

> "The service, however, was performed subject to the law of the land requiring that the carriers' charges should not be unreasonable or unjustly discriminatory."

and in *O'Keefe* v. *United States*, 240 U. S. 294, 304 (1916):

> "The trunk line has no constitutional right to build up its business by paying bonuses or rebates that have been forbidden by act of Congress for considerations affecting the public welfare."

Appellants have not urged the uncertainty of the term, cost, as used in the order as a ground in support of their contention of unconstitutionality. They have, however, alleged in a footnote (Appellants' Brief, page 6) that the term, cost, "is not defined with the certainty required in respect of an order for the violation of which dire penalties may be imposed."

The Commission has indicated the items included within the cost standard provided in the order. It has stated that cost includes all items which under proper accounting methods are comprehended in that term. (R. 186.)

The Commission was not laying down a rule, it was
dicating a standard. A standard cannot, by its very natu
be delimited with precision. The fact that in instances
application of a standard may involve complicated det
minations is not fatal to the propriety of its use.

As stated by this Court in *Nash* v. *United States*, 229 U.
373, 377 (1913) wherein the Sherman Anti-Trust Act w
held constitutional:

> "But apart from the common law as to restricti
> of trade thus taken up by the statute the law is full
> instances where a man's fate depends on his estimat
> rightly, that is, as the jury subsequently estimates
> some matter of degree. If his judgment is wrong,
> only may he incur a fine or a short imprisonment
> here; he may incur the penalty of death."

See also

Waters-Pierce Oil Company v. *Texas*, 212 U. S.
(1909), and

Small Company v. *American Sugar Refining Co*
pany, 267 U. S. 233 (1925).

Not only is the standard of cost set forth in the Comm
sion's order sufficiently certain, but mistaken applicat
of the cost standard would not, without more, lead to
imposition of penalties, as has been urged by Appella
Penalties arise only from knowing violation of the ord
(Section 16 (8) of the Act.)

In *Omaechevarria* v. *Idaho*, 246 U. S. 343, 348 (191
sheepmen complained of a state statute as uncertain. Th
contention was overruled, this Court stating:

> "* * * Furthermore, any danger to sheepm
> which might otherwise arise from indefiniteness,
> removed by Sec. 6314 of Revised Codes, which provi
> that. 'In every crime or public offense there m
> exist a union, or joint operation, of act and intent,
> criminal negligence.'"

and in *Hygrade Provision Company* v. *Sherman*, 266 U. S. 4
502 (1925) this Court said:

"* * * the evidence, while conflicting, warrants the conclusion that the term 'kosher' has a meaning well enough defined to enable one engaged in the trade to correctly apply it, at least as a general thing. If exceptional cases may sometimes arise where opinions might differ, that is no more than is likely to occur, and does occur, in respect of many criminal statutes either upheld against attack or never assailed as indefinite * * *

"* * * Moreover, as already suggested, since the statutes require a specific intent to defraud in order to encounter their prohibitions, the hazard of prosecution which appellants fear loses whatever substantial foundation it might have in the absence of such requirement."

Similarly when an order of the Federal Communications Commission was alleged to be uncertain because requiring utility to record "estimated" original costs, this Court said:

"If instances shall occur in which a company is unable to make an intelligent estimate with even approximate correctness, that exceptional event will justify resort to the Commission for particular instructions. In no event is there a substantial hazard of criminal prosecution. *To subject the company or its officers to prosecution for a crime the violation of the Act must have been knowing and wilful.*" (Italics supplied).

American Telephone & Telegraph Company v. *United States*, 299 U. S. 232, 245 (1936).

No basis exists for a claim that the Commission's order now before this Court is unconstitutional.

Conclusion.

These Appellees respectfully submit that the Comm
sion's order of February 2, 1937, is valid, and that the F
Decree of the United States District Court for the South
District of New York sustaining said order should
affirmed.

Respectfully submitted,

HENRY PARKMAN, Jr.
Corporation Counsel,
of Boston,
11 Beacon Street,
Boston, Massachus
HENRY E. FOLEY
Counsel for Boston P
Authority,
10 Post Office Squa
Boston, Massachus

LEWIS H. WEINSTEIN
Assistant Corporation Counsel,
City of Boston,
11 Beacon Street,
Boston, Massachusetts,
Of Counsel.

November 5, 1938.

APPENDIX.

(See page 4, *ante*)

The following are the portions involved in this case of sections 2, 3, 6, 15 and 16 of the Interstate Commerce Act.

SECTION 2. [*As amended February 28, 1920, June 19, 1934, and August 9, 1935. U. S. Code, title 49, sec. 2.*] That if any common carrier subject to the provisions of this part shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this part, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

SECTION 3. [*As amended February 28, 1920, March 4, 1927, August 9, 1935, and August 12, 1935. U. S. Code, title 49, section 3.*] (1) It shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

SECTION 6. [*As amended March 2, 1889, June 29, 19*
June 18, 1910, August 24, 1912, August 29, 1916, February 2
1920, and August 9, 1935.. U. S. Code, title 49, section
(1) That every common carrier subject to the provisions
this part shall file with the Commission created by this pa
and print and keep open to public inspection schedules sho
ing all the rates, fares, and charges for transportation betwe
different points on its own route and between points on i
own route and points on the route of any other carrier b
railroad, by pipe line, or by water when a through route an
joint rate have been established. If no joint rate over th
through route has been established, the several carriers i
such through route shall file, print and keep open to publi
inspection as aforesaid, the separately established rates, fare
and charges applied to the through transportation. Th
schedules printed as aforesaid by any such common carrie
shall plainly state the places between which property and
passengers will be carried, and shall contain the classificatio
of freight in force, and shall also state separately all termina
charges, storage charges, icing charges, and all other charge
which the Commission may require, all privileges or facilitie
granted or allowed and any rules or regulations which in any
wise change, affect, or determine any part or the aggregate o
such aforesaid rates, fares, and charges, or the value of the
service rendered to the passenger, shipper or consignee. Such
schedules shall be plainly printed in large type, and copies
for the use of the public shall be kept posted in two public
and conspicuous places in every depot, station, or office of
such carrier where passengers or freight, respectively, are
received for transportation, in such form that they shall be
accessible to the public and can be conveniently inspected.
The provisions of this section shall apply to all traffic, trans-
portation, and facilities defined in this part.

(7) No carrier, unless otherwise provided by this part,
shall engage or participate in the transportation of passengers
or property, as defined in this part, unless the rates, fares, and
charges upon which the same are transported by said carrier
have been filed and published in accordance with the pro-

of this part; nor shall any carrier charge or demand collect or receive a greater or less or different compensation for such transportation of passengers or property, or any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.

SECTION 15. [*As amended June 29, 1906, June 18, 1910, February 28, 1920, March 4, 1927, June 19, 1934, and August 9, 1935. U. S. Code, title 49, section 15.*] (13) If the owner of property transported under this part directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this section.

SECTION 16. [*As amended March 2, 1889, June 29, 1906, June 18, 1910, February 28, 1920, June 7, 1924, and August 9, 1935. U. S. Code, title 49, section 16.*] (8) Any carrier, any officer, representative, or agent of a carrier, or any receiver, trustee, lessee, or agent of either of them, who knowingly fails or neglects to obey any order made under the provisions of sections 3, 13, or 15 of this part shall forfeit to the United States the sum of $5,000 for each offense. Every distinct violation shall be a separate offense, and in case of a continuing violation each day shall be deemed a separate offense.